

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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DEC - 9 2002

In the Matter of:

Rules and Regulations Implementing
the Telephone Consumer Protection
Act of 1991

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CG Docket No. 02-278

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF DIRECTV, INC.

DIRECTV, Inc. ("DIRECTV") hereby submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding.* DIRECTV urges the Commission in its further implementation of the Telephone Consumer Protection Act ("TCPA") to: (1) establish a national database of consumers who do not wish to receive telephone solicitations, *i.e.*, a national "Do Not Call" list, in order to simplify compliance; and (2) clarify certain rules of liability in order to achieve the policy goals of the TCPA, while also providing a settled legal framework that avoids plaintiff abuses and unjustified penalty claims – not contemplated by the statute – against parties who have not requested or directed the complained-of telemarketing activities.

I. INTRODUCTION

DIRECTV appreciates the Commission's efforts to bring under control the nuisance that can be created by unwanted fax and telephone solicitations. DIRECTV as a company does not advertise its services by facsimile, and when DIRECTV engages in telephone solicitations, it

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, LLC, a licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

² See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, CG Dkt No. 02-278, CC Dkt No. 92-90 (rel. Sept. 18, 2002).

does so only through established and reputable telemarketing companies with good track records of TCPA compliance. DIRECTV does not condone telemarketing activities that fail to comply with telemarketing laws and requirements, and has adopted policies and procedures to assist DIRECTV in remaining in compliance with the TCPA.

In support of the policies underlying the TCPA, DIRECTV encourages the Commission to use this proceeding as an opportunity to establish a national Do Not Call list. Consumers and businesses will benefit from having a single point of contact. DIRECTV also encourages the Commission to use this proceeding as an opportunity to clarify liability under the regime created by the TCPA, in order to ensure that only those parties who are responsible under the language of the TCPA are held liable for unsolicited faxing. The statute extends liability to persons who “use” a facsimile machine to “send” unsolicited faxes. Under the Commission’s current “on behalf of” opinion, however, aggressive plaintiffs’ lawyers are attempting to hold “deep pocket” defendants liable for other companies’ fax activities, even though such defendants did not request, direct or otherwise participate in the complained-of telemarketing activities. Such clarification, while remaining beneficial to consumers and advancing the goals of the statute, will restore due process and fairness to innocent third parties who have been targeted by aggressive plaintiffs’ attorneys for class action lawsuits.

II. THE COMMISSION SHOULD ASSERT THE AUTHORITY GRANTED TO IT UNDER THE STATUTE TO ESTABLISH A NATIONAL DATABASE TO RECORD “DO NOT CALL” REQUESTS

Congress, in granting the Commission rulemaking authority, expressly provided that the regulations contemplated “may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations.” A single national database would benefit both consumers and businesses that seek to conduct telemarketing in a responsible manner and in full compliance

with the TCPA. Rather than having to request “Do Not Call” status from each individual business utilizing telemarketing, a consumer who objects to receiving telephone solicitations would be able to make one single request for inclusion in the national database. While some states are implementing state-wide databases, a single national database is preferable to the consumer, who will then be protected regardless of state residence or interstate moves.

Businesses, which confront not only the challenge of maintaining their own internal “Do Not Call” lists, but also the task of remaining up-to-date with non-uniform state databases and requirements, would also benefit from the adoption of a single, pre-emptive national database. A single, centralized database would simplify compliance procedures.

III. THE COMMISSION SHOULD CLARIFY THAT LIABILITY UNDER THE TCPA EXTENDS ONLY TO THOSE WHO “USE” A FACSIMILE MACHINE TO SEND UNSOLICITED ADVERTISEMENTS AND THAT LIABILITY DOES NOT EXTEND TO THOSE WHO DID NOT REQUEST OR DIRECT THE COMPLAINED-OF FACSIMILE ADVERTISING

The Commission previously stated that “[t]he entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning facsimile advertisements.”³ Based in part on this statement, aggressive plaintiffs have attempted to parlay the TCPA’s private rights of action⁴ into a means of imposing liability – and penalties of from \$500 to \$1,500 per occurrence – upon any entity whose products or services may happen to be advertised or offered for sale by the actual violators, regardless of whether that entity requested, caused, directed or participated in the complained-of telemarketing activity. Indeed, liability is sought to be imposed on entities that were not even aware of the telemarketing activity until after-the-fact. DIRECTV has been the target of such claims, with plaintiffs asserting that

³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Memorandum Opinion and Order*, 10 FCC Rcd 12391 ¶ 35 (1995) (quoted in Notice ¶ 40).

⁴ See 47 U.S.C. §227(b)(3), § 227(c)(5).

DIRECTV should be liable under the TCPA for fax advertisements sent without DIRECTV's knowledge, direction or control, by fax broadcasters hired by independent retailers (again, without DIRECTV's knowledge, direction or control), though DIRECTV has only an independent contractor relationship with such retailers.⁵ Because of these overreaching abuses, DIRECTV urges the Commission to reconsider its "on behalf of" opinion. The TCPA expressly extends liability only to those who actually "use" a facsimile machine to send an unsolicited fax. The Supreme Court has stressed the importance of interpreting federal statutes based on their plain language, and has interpreted the statutory word "use" to require "active employment."⁶ Moreover, vicarious liability principles should not apply because the "on behalf of" phrase does not appear in the fax provisions of the TCPA (§ 227(b)(3)) but does appear in the telephone provisions of the TCPA (§ 227(c)(5)). Congress' decision to use "on behalf of" vicarious-liability language in one part of the statute but not the other should be given meaning under established canons of statutory interpretation.

The plaintiffs' lawyers' "strict liability" approach, which seeks to hold companies responsible for the independent actions of independent contractors under the Commission's "on behalf of" opinion, is contrary to the plain language of the statute. Their approach lacks any mechanism for assessing the actual relationships among the allegedly unscrupulous fax

⁵ DIRECTV's contracts with independent retailers require such retailers to comply with all applicable laws and appropriate standards of conduct when promoting DIRECTV's service or the DIRECTV-branded products of other companies. DIRECTV does not have the ability to control the business of, or dictate the marketing activities and channels pursued by, these independent companies. DIRECTV has, however, adopted and circulated *an* express policy to alert retailers to the existence of telemarketing laws, and to encourage independent retailers to retain legal counsel to ensure their full compliance.

⁶ See *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The word 'use' in the statute must be given its 'ordinary or natural' meaning [The] various definitions of 'use' imply action and implementation"); see also *Jones v. United States*, 529 U.S. 848, 855 (2000) ("the word 'use', in legislation as in conversation, ordinarily signifies 'active employment'").

broadcaster, the independent retailer and the underlying service provider, and is not in the public interest. By the same logic, an errant travel agent could expose airlines and hoteliers to TCPA penalties; a wayward car dealer could expose auto manufacturers to TCPA penalties; indeed, any independent retailer could expose to penalties the manufacturer of any product or provider of any service that the independent retailer advertises or offers for sale. If liability were extended in such a manner, what would prevent the next logical extension, to the shareholders of the airlines, hotels, and automobile manufacturers. Such results are not sound public policy, and plainly were not intended by the TCPA.

Basic notions of fairness and culpability dictate that a person or entity who commits a wrong, and not some other person or entity, particularly those unaware of the activity, should be liable for that action. At the very least, where a person or entity has not requested or directed a certain course of conduct, that person or entity should not be held responsible for the outcome of that conduct. The FCC has recognized this principle, for example, in its *Second Thursday* doctrine, whereby “innocent creditors” are allowed to profit from the sale of a radio broadcast license that might otherwise be revoked, so long as the wrongdoing party does not share in the proceeds.⁷

Nor would it serve any useful purpose to expand liability beyond those that requested or directed the conduct at issue. DIRECTV and other providers of goods and services typically do not direct to whom independent retailers transmit faxes or place telephone calls, whether such independent retailers do it directly or through third parties. Nor do they have sufficient control over those actions: even if it comes to the good or service provider’s attention that an independent retailer is following some improper course of action, in most cases, the provider

⁷ See, e.g., *MobileMedia Corp, Memorandum Opinion and Order*, 14 FCC Rcd 8017 ¶ 4 (1999) (citing *Second Thursday Corp.*, 25 FCC 2d 112 (1970)).

cannot force the distributor to change its course. The most it can do is enforce its contractual rights, which may or may not include a right of termination. At bottom, it is unreasonable, and would simply be unworkable, for every manufacturer or service provider to assume an affirmative role in policing the telephone and facsimile usage of independent third parties, and enforcing the TCPA against each of its independent retailers and their third party contractors. The penalty scheme in the TCPA was designed to encourage consumers troubled by telemarketing activities to pursue claims against the parties truly responsible for the activities, and to deter those culpable parties from further misconduct. The scheme is perverted if innocent third party manufacturers or service providers are permitted to be drafted involuntarily to enforce the TCPA.

The Commission should act to clarify the liability, if any, that service providers face when an independent retailer, or a third party contracted by the independent retailer, violates the TCPA. The conduct at issue here is inherently interstate and inter-jurisdictional, and thus is ripe for a single federal liability rule. The Commission should enable entities like DIRECTV, which want to comply with the law, prospectively to structure their affairs in order to do so. That is, the Commission should establish a clear rule to govern under what circumstances ~~an~~ entity will or will not assume liability for the actions of another person or entity under the TCPA.

California has adopted an approach to unwanted telephone calls that may be instructive in this context. There, the independent contractor that actually places an unwanted telephone call is subject to liability, not the entity whose products or services are being advertised or sold, unless that service provider actually controls the independent contractor's business practices.'

DIRECTV proposes that the Commission adopt a similarly straightforward analysis that liability follows the TCPA's wording. An entity is liable under the TCPA only if it uses a

⁸ See Cal. Bus. & Prof. Code § 17592(b).

facsimile machine to send an unsolicited fax advertisement. Specifically, the Commission should adopt the following rule: (1) The entity responsible for the transmission of a fax or placement of a telephone call, not the entity whose products or services are being advertised, should be held liable if the transmission or phone call results in a prohibited, unsolicited fax or call under the provisions of the TCPA; and (2) “on behalf of” liability does not extend to the fax provisions of the TCPA and does not extend to a product manufacturer or service provider that did not request or direct the specific complained-of telephone solicitation.

This simple rule would provide prospective certainty, as entities such as DIRECTV could accurately gauge any potential liabilities under the TCPA. Moreover, wronged parties would gain from this rule, as the rule would make clear which entity they should pursue should a violation occur. And most importantly, the rule would ensure that unrelated third parties are not unfairly tarred by conduct that they have neither requested nor directed.

IV. THE FCC SHOULD CLARIFY THE SCOPE AND AVAILABILITY OF PRIVATE REMEDIES UNDER THE TCPA

Several specific avenues of relief are available to remedy violations of the TCPA. The recipient of **an** unlawful telephone or fax solicitation is explicitly permitted to bring a private action for damages or injunctive relief in state court.⁹ The available remedies of \$500 to \$1,500 per violation were deemed by Congress to be appropriate for hearing in small claims court. The bill’s sponsors intended to make it as “easy as possible” for consumers to bring individual actions, “preferably in small claims court,” and “without **an** attorney,” and therefore set the damages in an amount sufficient to offset the “costs to consumers of bringing an action.”¹⁰ Yet at the same time, Congress recognized that excessive damages awards could be unfair to

⁹ See 47 U.S.C. § 227(b)(3).

¹⁰ 137 Cong. Rec. S16205 (Nov. 7, 1991) (Statement of Sen. Hollings).

telemarketers and might chill legitimate conduct, and thus observed the need “to be fair to both the consumer and the telemarketer.”¹¹

Some plaintiffs have sought to augment these available remedies by bringing class actions in state courts of general jurisdiction, rather than in small claims court. By aggregating hundreds and even thousands of alleged violations, aggressive plaintiffs’ lawyers are able to produce multi-million dollar *ad damnums*, and have used these to demand large settlements, with generous provision for attorneys’ fees. This is not what Congress intended. The TCPA’s provision for substantial liquidated damages was enacted in order to make individual actions financially viable.” But having provided a remedy designed to foster individual claims, Congress did not intend to allow the aggregation of these claims into consumer class actions, which are meant to remedy claims that are so small as not to be capable of individual resolution.

To the extent that the private individual claims are incapable of discouraging TCPA violations, or of punishing violators, the Commission should and does take action to look after the collective public interest. Thus the Commission was made by Congress a central part of the TCPA enforcement regime. The FCC has exercised jurisdiction over entities that violate the TCPA, and indeed has issued millions of dollars in fines.¹³ These remedies are sufficient to deter violations of the TCPA, to make victims whole when violations occur, and to punish violators. The Commission should clarify that it can and does take an active role in the enforcement of the TCPA. The FCC should make plain that its own enforcement mechanisms, together with the

¹¹ *Id.*

¹² *Id.*

¹³ *See, e.g.*, 21st Century Fax(es) Ltd. Apparent Liability for Forfeiture, ***Forfeiture Order***, 17 FCC Rcd 1384 (2002) (imposing \$1.1 million fine for unauthorized facsimile advertisements).

generous availability of individual remedies, solve any “collective action” problem that would otherwise require the certification of consumer class actions.

V. FAX SOLICITATIONS MAY BE BASED ON BUSINESS RELATIONSHIP OR PERMISSION

Congress, when it passed the TCPA, and the Commission in promulgating its rules, have recognized that not all unsolicited facsimiles should be *prohibited*.¹⁴ The TCPA’s sponsors noted that its aim was “not to eliminate the brave new world of telemarketing, but rather to secure an individual’s right to privacy.”¹⁵ Thus the Act contemplated that the FCC would “exempt, by rule or order, classes or categories of calls made for commercial purposes that do not ‘adversely affect the privacy rights’” of consumers.¹⁶ The Act thus sought to screen out “*junkfaxes*” and “unwanted telephone solicitations” from those solicitations by “legitimate businesses” that are made “without annoying consumers.”¹⁷

A. The Commission Should Preserve And Clarify The Established Business Relationship Exemption

One category of solicitation that Congress saw fit to treat explicitly was facsimiles sent to recipients with *an* “established business relationship” with the sending party. The “established business relationship” exemption of the TCPA permits a business to send unsolicited facsimile advertisements to a person or business with whom it has an established business relationship. The Commission should amend its rules to expressly provide for this exemption. The exemption is driven by two separate and important lines of reasoning. The first is that the existence of a

¹⁴ While, as noted above, DIRECTV does not utilize facsimile advertising, it is nevertheless interested in this subject due to the fact that DIRECTV has been targeted by plaintiffs’ attorneys for class action lawsuits as a result of **fax** advertising conducted by independent third parties, and DIRECTV does use telephone solicitation to notify existing customers of programming and pay per view events that might be of interest to those customers.

¹⁵ 137 Cong. Rec. H11307-01 (statement of Rep. Markey).

¹⁶ *Id.*

¹⁷ *Id.* (statement of Rep. Rinaldo).

business relationship suggests that the consumer will not be “annoyed” by the receipt of a fax, and indeed may appreciate receiving it. For example, a travel agent who becomes familiar with his customer’s travel patterns might fax unsolicited information about destinations the agent has reason to believe the customer will find useful.

To the extent a customer finds such advertisements unhelpful or annoying, the second rationale for the “business relationship” exemption comes into play, as the customer governs the terms of that relationship. **An** investor might appreciate learning of investment opportunities from his own chosen broker, but regard as a nuisance a “cold call” from another broker. The chosen broker has every incentive to ensure that the opportunities he presents are helpful, and will continue to generate more business. To the extent the customer finds his broker’s solicitations to be unhelpful and annoying, he can instruct the broker to stop, and terminate the relationship if he does not. Where there is an existing relationship between the sender and recipient of an unsolicited fax or phone call, government intervention is unnecessary, and potentially counterproductive.

The Commission should therefore retain the established business relationship exemption, and should amend its rules to expressly provide for the exemption. The Commission should make plain that an entity will not face liability under the TCPA for sending a facsimile advertisement or placing a call to any consumer with whom the sender has an ongoing business relationship. The Commission should not attempt to regulate the content of the permissible faxes or calls, allowing, for example, the sender only to send faxes or make calls concerning the specific product or service a consumer has already purchased.¹⁸ This would lead to line-drawing problems and might prevent the receipt of desired information. And, given the ability of individuals to control and/or terminate their business relationships, it is not necessary.

¹⁸ Notice ¶ 39.

B. Publication Of Fax Numbers Should Generally Be Considered “Permission”

The Notice invites comment on whether “the publication of one’s fax number in an organization’s directory constitute[s] an invitation or permission to receive an unsolicited fax.””

The FCC has heretofore dealt on a case-by-case basis with the question of what constitutes “permission” or “invitation” sufficient to authorize a facsimile, and DIRECTV believes that it should continue to do so. The publication of a fax number will in many cases imply permission or invitation. For example, the publication of a fax number in a professional directory or on a business website generally should be presumed to constitute permission to use that number.

The Commission, however, should clarify that private parties may “opt out” of this implied permission. When a fax number is published, one may make explicit whether that publication constitutes permission for it to be put to a particular use. A professional organization that publishes the fax numbers of its members is perfectly capable of establishing (and publishing) guidelines for the use of those numbers. Those guidelines then would dictate whether the requisite invitation exists for purposes of TCPA liability. In this way, again, private parties may control the circumstances under which they are willing to receive unsolicited facsimiles, and TCPA liability should arise only where such published guidelines are violated. Publication of fax numbers should generally be deemed permission to use those numbers, subject to the restrictions on use provided in connection with such publication.

VI. CONCLUSION

Unwanted telephone calls and fax solicitations can be annoying, and the Commission has appropriately proposed to take further action to curb such activities. Yet, as it proceeds through this rulemaking, the Commission should be careful not to punish innocent parties, or to prohibit

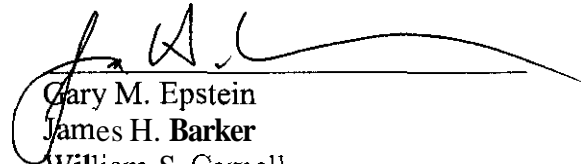
¹⁹ Notice ¶ 38.

legitimate business activities. DIRECTV thus urges the Commission to implement the TCPA in conformance with DIRECTV's recommendations above.

Respectfully submitted,

DIRECTV, Inc.

By:

A handwritten signature in black ink, appearing to read "Gary M. Epstein", is written over a horizontal line.

Gary M. Epstein

James H. Barker

William S. Carnell

LATHAM & WATKINS

555 Eleventh St., NW

Suite 1000

Washington, DC 20004-2505

(202) 637-2200

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